No. A23-1284

State of Minnesota
in Supreme Court

Energy Transfer LP (f.k.a. Energy Transfer Equity, LP), et al.,

Appellants,

vs.

Greenpeace International (a.k.a. Stichting Greenpeace Council), et al.,

Defendants,

Unicorn Riot, et al.,

Respondents.

BRIEF OF *AMICUS CURIAE* THE FORUM FOR CONSTITUTIONAL RIGHTS SUPPORTING RESPONDENTS UNICORN RIOT, ET AL.

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Amicus Identity, Interest, & Authority to File[1]

A. Identity of The Forum for Constitutional Rights (FCR)

The Forum for Constitutional Rights (or FCR) is a general public-benefit corporation that is organized and operated under Minnesota law. FCR provides public education about constitutional history and rights, including (but not limited to) rights enshrined by the First Amendment. FCR's public education efforts include filing *amicus curiae* briefs in cases involving First Amendment rights and other important constitutional protections. FCR's advocacy is non-partisan in nature.

B. FCR's Interest in *Energy Transfer LP*

FCR's interest in *Energy Transfer* is public. The Minnesota Free Flow of Information Act (or MFFIA) safeguards "the confidential relationship between the news media and its sources." Minn. Stat. §595.022. FCR seeks to ensure courts enforce this press protection consistent with the MFFIA's careful drafting. FCR opposes reading exceptions into the MFFIA that the law does not contain, that would render parts of the law superfluous, and that would ultimately compromise the practice of journalism.

C. FCR's Authority to File in *Energy Transfer LP*

On August 29, 2024, the Court granted FCR leave to file this brief.

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[1] Amicus FCR certifies under MRCAP 129.03 that: (1) no counsel for a party authored this brief either in whole or in part; and (2) no person or entity has contributed money to the preparation or submission of this brief other than FCR, its members, and its counsel.

Argument

Many states have enacted "shield laws" that privilege the work of journalists and publishers in recognition of the vital role that freedom of the press serves in a civil, democratic society. Minnesota is one such state. In 1973, the Legislature enacted the Minnesota Free Flow of Information Act (MFFIA), Minn. Stat. §§595.021 *et seq*. The MFFIA protects any person engaged in newsgathering from being compelled to disclose their sources. The law thus recognizes the whistleblowers and witnesses who might not come forward absent guaranteed anonymity. The MFFIA also establishes a distinct journalistic privilege for unpublished material—a category that the Legislature has expanded since the MFFIA's passage.

In this case, the court of appeals recognized that the MFFIA enacts broad journalistic protections that yield only when a party satisfies one of the statute's two express exceptions. If neither exception applies, then a party may not compel a newsgatherer to disclose sources or unpublished material. The court of appeals correctly held that the MFFIA protected the journalism of Unicorn Riot and Niko Georgiades against Energy Transfer, which did not assert that any express MFFIA exception applied.

Energy Transfer now argues—as it argued below—that the MFFIA contains a hidden exception when a party generally alleges the presence of unlawful or tortious conduct in newsgathering. Energy Transfer thus invites the Court to treat judicial interpretation of the MFFIA as a chance to reinvent the statute. This invitation comes heedless of the meticulous balance that the MFFIA already strikes between the interests of the news media, law enforcement, and various other interested parties.

Energy Transfer is not entitled to upset the legislature's careful work by having the Court devise out of whole cloth an exception to the MFFIA present nowhere in the statute's actual words. Such an exception would not only exceed the judicial function, but would also call into question the scope of the MFFIA's protections going forward in critical newsgathering contexts (e.g., protests and civil unrest). The result would be an erosion of the robust journalism that the Legislature sought to safeguard. The Court should thus affirm the court of appeals' holding that the MFFIA contains no generalized exception to its broad protections whenever a party comes along and claims the presence of unlawful/tortious conduct.[2]

I. The broad journalistic protections of the Minnesota Free Flow of Information Act (MFFIA) lack any hidden, sweeping exception for allegedly unlawful/tortious conduct.

The MFFIA covers all persons "directly engaged in the gathering, procuring, compiling, editing, or publishing of information for the purposes of transmission, dissemination, or publication to the public."

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[2] When this case was before the court of appeals, FCR filed an amicus brief rebutting another exception that Energy Transfer seeks to add to the MFFIA, albeit by implication: that the MFFIA is less protective of (or does not apply at all) to news media like Unicorn Riot that are non-traditional or are ideologically oriented. Before this Court, Energy Transfer persists in implying that press conventionality and ideological orientation matter in applying the MFFIA—for example, describing Unicorn Riot as "a far-left organization of 'citizen journalists'" and stressing that "Unicorn Riot reports from a far-left and antiestablishment political … perspective." (*See* Appellants' Br. 2, 6.) The court of appeals correctly rejected this gambit: "the record supports … that Unicorn Riot … qualifies as a news media organization [under the MFFIA]." (*See* Appellant's Add. 11.) This Court should reject all Energy Transfer advocacy to the contrary.

Minn. Stat. §595.023. The MFFIA broadly protects such newsgatherers (for short) against government or civil efforts to compel disclosure of sources (informants), "unpublished information," or "the person's notes, memoranda, recording tapes, film or other reportorial data." *Id.*

The MFFIA contains just two exceptions to this broad protection. The first, codified under Minn. Stat. §595.024, is for specific information related to felonies, gross misdemeanors, and misdemeanors. The second, codified under Minn. Stat. §595.025, is for certain defamation actions. The MFFIA narrows each of these two exceptions by establishing a series of threshold requirements under each exception that a party must satisfy to defeat the MFFIA's broad protections. For example, per the defamation exception, a party seeking disclosure must demonstrate "the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights." Minn. Stat. §595.025, subd. 2(b).

The court of appeals here correctly observed that "[t]he legislature included two and only two exceptions to the privilege against disclosure accorded under the MFFIA." (Appellant's Add. 12.) The court also rightly determined that "neither exception provided in the MFFIA applie[d]" to the information that Energy Transfer sought to obtain from Unicorn Riot. (Appellant's Add. 3.) Indeed, Energy Transfer "[did] not assert that either [MFFIA] statutory exception … applies." (Appellant's Add. 11.)

The court of appeals' MFFIA analysis thus followed the time-tested path so many other courts have followed in applying the MFFIA: that the MFFIA's exceptions are limited to those expressed by the statute's plain

language, and courts are not free to invent their own MFFIA exceptions. *See, e.g., Range Dev. Co. v. Star Tribune,* 885 N.W.2d 500, 511 (Minn. App. 2016) ("Range has not made the affirmative showing required to merit an exception to the [MFFIA's] general rule …."); *In re Application of Mahtani*, No. 27-CV-17-11589, 2017 Minn. Dist. LEXIS 7, at *7 (Minn. Dist. Ct. Sept. 25, 2017) ("The Act provides two exceptions that compel disclosure …."); *see generally* Minn. Stat. §645.19 (establishing that "[e]xceptions expressed in [Minnesota] law shall be construed to exclude all others").

Before this Court, Energy Transfer does not assert that either of the MFFIA's plain-text exceptions applies to the information that it seeks. (*See* Appellant's Br. 14–22.) Energy Transfer instead proposes judicial creation of a new MFFIA exception: a general right to compel newsgatherers to disclose "information [allegedly] created or obtained during the commission of—and in furtherance of—unlawful, tortious, and/or criminal conduct." (Appellant's Br. 14.) This general right would operate separate from the MFFIA's plain-text exceptions for defamation actions and for criminal offenses—exceptions that already function to compel disclosure in some cases of unlawful/tortious acts, given the proper set of facts.

The MFFIA does not contain the general right that Energy Transfer propses, and Minnesota courts will not "add words to the plain language of a statute to fit with an identifiable policy." *Gen. Mills, Inc. v. Comm'r of Revenue*, 931 N.W.2d 791, 800 (Minn. 2019). The court of appeals correctly enforced that rule here—one of vital importance to ensuring that debates over a statute's wisdom (especially on the subject of journalistic freedom)

"[are] waged at the legislature, not in the judicial branch." *S. Minn. Beet Sugar Coop v. Cty. of Renville*, 737 N.W.2d 545, 553 n.3 (Minn. 2007). While Energy Transfer may be dissatisfied with the Legislature's adoption of just two MFFIA exceptions, Energy Transfer may not petition the courts to rewrite the statute contrary to the Legislature's choices.

A. The MFFIA enacts two limited exceptions to the statute's broad journalistic protections—exceptions requiring proof of specific factors, not generalized assertions.

The MFFIA's two plain-text exceptions already address certain kinds of unlawful/tortious conduct—namely, specific types of criminal offenses (§595.024), and defamation actions in which "actual malice" is an element (§595.025). Each plain-text exception, in turn, articulates several threshold requirements that must be met before the MFFIA's broad protections will yield. For the criminal-offense exception, these threshold requirements include establishing by "clear and convincing evidence" every single one of the following three "conditions" without qualification:

> (1) that there is probable cause to believe that the specific information sought
>
> (i) is clearly relevant to a gross misdemeanor or felony, or
>
> (ii) is clearly relevant to a misdemeanor so long as the information would not tend to identify the source of the information or the means through which it was obtained,
>
> (2) that the information cannot be obtained by alternative means or remedies less destructive of first amendment rights, and
>
> (3) that there is a compelling and overriding interest requiring the disclosure of the information where the disclosure is necessary to prevent injustice.

Minn. Stat. §595.024, subd. 2.

For the defamation exception, the threshold requirements are no less demanding. These requirements include:

(a) that there is probable cause to believe that the source has information clearly relevant to the issue of defamation;

(b) that the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights.

Id. §595.025, subd. 2.

In rejecting Energy Transfer's bid to re-write the MFFIA, the court of appeals explained that the MFFIA's existing language controls. Accepting Energy Transfer's argument "would require [the court] to add the word 'lawful' into section 595.023 such that the privilege … would extend only to 'the [*lawful*] gathering, procuring, compiling, editing, or publishing of information.'" (Appellant's Add. 12.) Energy Transfer's argument also contradicted the MFFIA's text in making the privilege turn "on the means used for newsgathering." (*Id.*) The MFFIA expressly "protects a news gatherer from being required 'to disclose … [the] means from or through which information was obtained.'" (*Id.*; Minn. Stat. §595.023.)

Multiple earlier courts have taken the same approach to the MFFIA. Courts have consistently made clear none of the MFFIA's express terms may be ignored—especially the strict threshold requirements imposed by each of the MFFIA's two plain-text exceptions:

- "There can be no question that all three of the conditions [to the MFFIA's criminal-offense exception] have not been satisfied. First and foremost, the information being sought [in this case] does not relate to a criminal offense." *Grunseth v Marriott Corp.*, 868 F. Supp. 333, 337 (D.D.C. 1994).

- "[A]n applicant seeking specific information from the news media relevant to a gross misdemeanor or felony must establish by clear and convincing evidence all three criteria of the subdivision." *Arneson v. Nienaber (In re Skjervold)*, 742 N.W.2d 686, 686 (Minn. App. 2007) (decision syllabus point).

- "[The MFFIA] requires an affirmative showing, with concrete evidence, that disclosure of the source will lead to persuasive evidence on the elements of a defamation claim." *Range Dev. Co. v. Star Tribune,* 885 N.W.2d 500, 505 (Minn. App. 2016).

- "[The] MFFIA provides two exceptions that allow a court to order disclosure of privileged information: one for criminal cases, and one for civil defamation cases. …. The party seeking disclosure has the burden of making an affirmative showing …." *In re Application of Mahtani*, No. 27-CV-17-11589, 2017 Minn. Dist. LEXIS 7, at *12 (Minn. Dist. Ct. Sept. 25, 2017).

While courts have faithfully enforced the MFFIA's plain text, the Legislature has consistently amended the statute in line with its express purpose: "to protect the public interest and the free flow of information" through "a substantial privilege." Minn. Stat. §595.022. For instance, in 1998, the Legislature expanded the MFFIA's protection of unpublished material to include all such material instead of just material that might reveal the identity of a source. *See* Act of Apr. 6, 1998, ch. 357, §1, 1998 Minn. Laws 589, 589 (codified at Minn. Stat. §595.023).[3] This reality then confirms the troubling nature of Energy Transfer's position here, which would have the Court curtail the MFFIA to a degree never countenanced by the Legislature in the statute's entire 51-year history (to date).

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[3] The Reporters Committee for Freedom of the Press (or RCFP) details the history of this amendment as part of RCFP's comprehensive review of the MFFIA. *See* RCFP, MINNESOTA: REPORTER'S PRIVILEGE COMPENDIUM, at II.A ("Shield law statute"), https://tinyurl.com/mr35kkpn.

B. The MFFIA's intricate statutory framework collapses to the extent that one reads an exception into the MFFIA for allegedly unlawful/tortious conduct.

To the extent one indulges Energy Transfer and reads into the MFFIA a general right to disclosure of information gathered or obtained through allegedly unlawful or tortious conduct, much of the MFFIA's existing text becomes counterproductive or meaningless.

Consider the MFFIA's plain-text exception for defamation cases. By its plain terms, this exception authorizes compelled disclosure of the identity of a newsgatherer's sources (e.g., the name of a whistleblower) when this "will lead to relevant evidence on the issue of actual malice." But if a defamation case raises no actual-malice question (e.g., because the case involves no public figure), then the MFFIA prohibits any compelled disclosure. The defamation exception also does not govern unpublished material—the exception only concerns source identities. *See Ducklow v. KSTP-TV, LLC*, Nos. A13-1279, et al., 2014 Minn. App. Unpub. LEXIS 169, at *10-11 (Minn. App. Mar. 3, 2014) ("[T]he [MFFIA] privilege for the identity of a source is subject to an exception in civil defamation cases, but the privilege for unpublished materials is not.")

These limitations become meaningless when one reads an exception into the MFFIA for "information [allegedly] created or obtained during the commission of—and in furtherance of—unlawful, tortious, and/or criminal conduct." (Appellant's Br. 14.) Since defamation is tortious conduct, every defamation case is now open season on related newsgatherer sources and unpublished material alike—even in defamation cases raising no actual-

malice issue. Put another way, reading any exception into the MFFIA for unlawful/tortious conduct would swallow §595.025 whole.

The same goes for the MFFIA's criminal-offense exception, which imposes its own set of carefully-drafted limits on compelled disclosure—including a required showing of a "compelling and overriding interest" to "prevent injustice." Minn. Stat. §595.024, subd. 2(3). When a case does not meet these criteria, Minnesota courts enforce the MFFIA and refuse to compel disclosure. In *Arneson v. Nienaber (In re Skjervold),* 742 N.W.2d 686 (Minn. App. 2007), a county attorney sought to compel disclosure of the contents of a telephone conversation between a newspaper reporter and a suspect during an armed standoff between the suspect and police. *See id.* at 687–88. The reporter invoked the MFFIA, and the court of appeals upheld this assertion because the county attorney failed to demonstrate the prevention-of-injustice necessary for the criminal-offense exception to apply. *Id.* at 690. ("[T]he [MFFIA] requires that the particular injustice be identified. Here, the county attorney has failed to do so ….").

Reading a general exception into the MFFIA for unlawful/tortious conduct would dispense with all such analysis as required by the terms of the criminal-offense exception. The only thing that would matter in a case like *Arneson* is that the contents of the reporter's phone conversation were (allegedly) "created or obtained during the commission of—and in furtherance of—unlawful, tortious, and/or criminal conduct." (Appellant's Br. 14.) The MFFIA's existing threshold requirements for disclosure in the criminal-offense context would fall out of the statute entirely.

Then there are the problems that a general exception for unlawful/tortious conduct would pose as a matter of evidentiary standards and burden of proof. The MFFIA's defamation exception categorically bars any compelled disclosure of unpublished material in defamation cases. This material would become fair game under a general exception for unlawful/tortious conduct—but subject to what evidentiary standard? Would a party first need to prove the existence of defamation (or some other "tortious conduct") to overcome the MFFIA? Or would a party's mere allegation of tortious conduct be enough? And if a mere allegation would not be sufficient, then how much evidence would a party have to provide of tortious conduct? Would "clear and convincing evidence" be good enough, as it is for the MFFIA's criminal-offense exception? Minn. Stat. §595.024, subd. 2. Something less? Something more?

There lies the systematic problem with Energy Transfer's view of the MFFIA. Any judicial recognition of a general exception for unlawful/tortious conduct means forfeiting the stable, predictable operation of the MFFIA's plain-text exceptions. The latter exceptions spell out the factors that govern their application—and, more critically, the burden of proof that goes with these factors. Effective journalism depends on clear rules like this. Defamation is one of the most commonly asserted claims that journalists face. The MFFIA's plain-text defamation exception makes it possible for journalists to know where the lines are. *See Range Dev. Co.*, 885 N.W.2d at 510–11 ("speculation" not enough for exception to apply). By contrast, Energy Transfer's view of the MFFIA risks the kind of chaos and conjecture that key forms of journalism can least afford.

II. Judicial recognition of an MFFIA exception for allegedly unlawful/tortious conduct would hinder effective journalism and newsgathering in a variety of important contexts.

A. Public protests and civil unrest.

The real-world dynamics of public protests and civil unrest illustrate the problem with Energy Transfer's approach to the MFFIA. Large-scale demonstrations present highly mutable circumstances and ever-changing conditions.[4] In in the blink of an eye, the legal situation on the ground can become hazy or hostile for journalists covering a demonstration. Reading a general exception into the MFFIA for unlawful/tortious conduct then means effectively denying MFFIA protections to most journalism in this context, no matter how scrupulous this coverage might be.

A demonstration may begin on a permitted route with government-approved conditions. This is often the case with protests held at political conventions, where municipal permits or court orders require any protest to start (or end) at a certain location, or mandate other parameters (e.g., confining marchers to sidewalks).[5] Sometimes all participants will obey the applicable rules, resulting in an uneventful gathering that prompts no law enforcement action. Other times, protest leadership may violate agreed-upon protest terms—or individual participants may opt to break the law—triggering a response from law enforcement.[6]

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4 *See, e.g.,* Melissa Santos, *Remembering Seattle's WTO Protests, 24 Years Later,* AXIOS, Nov. 29, 2023, https://tinyurl.com/53y9htd4.

5 *See, e.g.,* Susan Saulny, *Judge Bars Big Rally in Park, But Protest March Is Still Set*, N.Y. Times, Aug. 26, 2004, https://tinyurl.com/vzbvjjsh.

6 *See, e.g.,* Adam Edelman, et al., *DNC Protest Ends With Arrests*, NBC NEWS, Aug. 21, 2024, https://tinyurl.com/23ersth6.

Proximity controls a journalist's ability to cover a demonstration effectively. Reporters must place themselves within the overall mass of protesters involved. Protest "marshals" who lead such events tend to be positioned at the front of the crowd. And this is the place where reporters must be located to capture protest developments—particularly the video, audio, and photographs that often end up telling the story.[7]

Reporters will need to actively talk to demonstration participants, gathering interviews on any number of topics. Many interviewees will be willing to provide comments "on the record" for direct quotation in text-based media (like a newspaper) or for recorded attribution in audiovisual media (like a TV newscast). But some interviewees will be willing to talk only on "background" and without attribution. Journalists will promise such interviewees that the reporter will not identify the interviewee in the reporter's story or publish identifying material in any form.[8]

When the police take enforcement actions during a large protest, these actions may occur quickly, with little or no warning. Also, when police detect lawbreaking within a small segment of a large crowd, they may take actions that ultimately affect the entire crowd—including every law-abiding reporter who is present to document the protest.

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[7] *See* Andy Day, *Blood, Sweat, & Teargas: What It Takes to Shoot Award-Winning Photographs of Violent Protest*, FSTOPPERS, Apr. 29, 2020, https://tinyurl.com/he4jwmsv ("[W]ith [the] protestors keeping themselves just out of range of the canisters of teargas … [photojournalist David] Butow would have to pick a side, knowing that the police will eventually make a charge, slow the protesters down, and start making arrests.").

[8] *See, e.g.,* Chuck Todd, *On the Record, Off the Record Explained*, NBCU ACADEMY, Sept. 16, 2021, https://tinyurl.com/3uhrv7p6.

Police actions may include suddenly declaring an entire protest unlawful (or issuing dispersal orders) to the extent that lawbreaking has reached a level that the police believe cannot be addressed on a case-by-case basis. Journalists are then caught in the crossfire.[9] The police may issue a dispersal order without a journalist realizing this as he or she tries to navigate a large, noisy crowd. But once the police issue such an order, the police may detain non-compliant parties —including members of the press who do not hear the order or just remain in place.[10]

Even if a journalist hears a dispersal order and wishes to comply, the journalist still may not be in a position to comply. This is especially true for photographers and videographers located at the heart of protest activity (whether there deliberately or otherwise). The crush of people may make exit impossible—particularly if other participants decide not to disperse. Then, when the police start making arrests, press unable to disperse may be swept up among those arrested and charged.[11]

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9 The 1999 World Trade Organization (WTO) protests in Seattle, WA exemplify this problem. The main protest involved mass-participation, properly-authorized marches. But within these marches, smaller groups of protesters started to engage in targeted vandalism, triggering a police reaction that affected all protest activity. In several instances, reporters were caught up in arrests after the police enforced city-wide emergency orders. *See, e.g., Charges Dismissed After Reporter Arrested, Jailed over WTO Protests*, RCFP, Dec. 3, 1999, https://tinyurl.com/3vznd7xs.

10 *See, e.g.*, Kevin Rector, *LAPD's Use of Protest Dispersal Orders Soars*, L.A. TIMES, Sept. 29, 2021, https://tinyurl.com/2p44tcd5.

11 *See, e.g.*, Cassandra Belter, *Unconventional Arrests*, RCFP, Fall 2004, https://tinyurl.com/fwvts4v8 (detailing how at the 2004 Republican National Convention, the NYPD "arrested … an unknown number of journalists, credentialed and noncredentialed," including reporters who were among "hundreds of people swept up in a mass arrest").

Finally, some reporters may choose to stay and risk arrest to gather newsworthy footage.[12] The risk will be theirs, but reporters sometimes make this choice to capture things that the public needs and deserves to witness to fully understand a public event. This choice—along with the other scenarios noted above—may then result in a journalist's arrest or in the police filling charges (i.e., for trespassing, obstruction, etc.). Local officials may of course later elect to abandon these actions—and in some circumstances, the actions themselves may be unlawful.[13]

Under current law, journalists facing such circumstances can assert the MFFIA to protect the identity of their sources and their unpublished materials related to the demonstration they covered. Police might seek to compel disclosure of this information to aid in their investigation of law-breaking by demonstration participants. Or prosecutors might seek this information to build a case against an arrested journalist. Depending on the circumstances of the case at hand, these actors may or may not be able to overcome the MFFIA's broad protections through invocation and proof of the MFFIA's plain-text criminal-offense exception.

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12 The famous 1999 photograph of federal agents seizing six-year-old Elian Gonzalez at gunpoint was taken despite—and contrary to—police orders. Just before the raid, freelance photographer Alan Diaz had been admitted into the house in which Gonzalez lived. *See, e.g.,* Jamiel Lynch, *Alan Diaz, Who Took Elian Gonzalez Photo, Dies at 71*, CNN, July 3, 2018, https://tinyurl.com/58p482nc ("As [Alan] Diaz stepped closer, the agent warned, 'Back off!'"). NBC cameraman Tony Zumbado separately rushed into the house as federal agents arrived. *See* Luisa Yanez, *NBC Cameraman Says INS Agents on Elian Raid Were Physically and Verbally Abusive*, S. FLA. SUN SENTINEL. June 9, 2000, https://tinyurl.com/mskvezf4.

13 *See, e.g.,* Seth Stern, *Chi. Police Ignore Warnings About Press Freedom at DNC Protests*, FOPF, Aug. 22, 2024, https://tinyurl.com/325cany2.

Imagine the police seek to identify a protester believed to have committed vandalism during a demonstration—i.e., information "clearly relevant" to a felony, a gross misdemeanor, or a misdemeanor. Minn. Stat. §595.024, subd. 2(a). The police contact a reporter who covered the protest and order the reporter to disclose his recording of an interview with a protest organizer that the reporter promised to keep private. The police believe that the protest organizer named the vandal.

Does the MFFIA protect the reporter? If the police can identify the alleged vandal "by alternative means or remedies less destructive of first amendment rights," the answer is 'yes.' The police having failed to meet all three elements of the MFFIA's plain-text criminal offense exception, the MFFIA fully protects the reporter. And numerous alternative means for identifying the vandal may exist, like footage from public security cameras. The point is that the MFFIA's strict terms require the police to consider alternatives instead of just fixating on the reporter.

To be sure, the MFFIA does not immunize any party's misconduct. Journalists and sources are still responsible for their own actions and may be held legally culpable for these actions if the relevant party meets their burden of proof (e.g., guilt beyond a reasonable doubt in a criminal case). The MFFIA simply establishes that newsgathering material may continue to be protected against compelled disclosure even when a given journalist or source may have engaged in unlawful/tortious conduct. Whether this protection finally applies "will depend upon the facts and circumstances of the particular [MFFIA] case." *Arneson*, 742 N.W.2d at 689.

Reading a general exception into the MFFIA for unlawful/tortious conduct upsets this entire equation, undermining journalistic freedom. Take the above-discussed hypothetical of a reporter's audio recording. Under a general exception for unlawful/tortious conduct, the police merely have to say the recording was made in furtherance of "unlawful conduct" (i.e., protecting the vandal), and that's the end of the road for the reporter. Members of the press must then reconsider whether they can risk covering demonstrations when doing so will almost certainly leave them unprotected against compelled disclosure.

These same problems go double when it comes to reporting on civil unrest. Press coverage of civil unrest is critical to public understanding, since the press serves as a proxy for every person who cannot be on the street but who is nonetheless impacted by the turmoil.[14] Reporters must place themselves in harm's way to gather and publish all the information that the public needs to know. But like mass demonstrations, the chaos of civil unrest—and the variability of police responses to this chaos—means that reporters may easily stumble into "unlawful conduct" while merely doing their jobs (e.g., entering a zone declared off-limits moments earlier by the police). Reporters under fire[15] should not also have to worry about whether the MFFIA will protect their critically important work.

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14 For example, during the 2020 civil unrest in the Twin Cities, state curfew orders issued by the Governor required most people to remain in their homes. *See* MINN. EXEC. ORDER 20-65 (May 29, 2020), https://tinyurl.com/yjhfx6ma ("A curfew is imposed ….").

15 *See* Brian Steinberg, *Journalists Under Fire: Reporters Covering Protests Face Rubber Bullets*, VARIETY, May 21, 2020, https://tinyurl.com/4nk2z34t (identifying many reporters hurt while covering 2020 civil unrest)

B. Receiving and publishing leaked material.

Reading a general exception into the MFFIA for unlawful/tortious conduct also jeopardizes the important journalism made possible through so-called "leaks" of information to reporters. "Leaks" are unsanctioned informational disclosures that usually expose institutional wrongdoing. Leaked information entails a quintessential example of why protecting the identity of sources is of such journalistic importance.

In organizations privy to wrongdoing—by public or private actors—organizational staff who know about the wrongdoing may feel compelled to contact reporters or press outlets and expose the misconduct.[16] In such cases, such inside sources often condition their provision of information on a journalist's promise that the source's name will never be associated with the leaked information.[17] Sometimes the leaked information takes the form of documents already governed by statutes or other authorities that forbid (or severely limit) public access to the information.[18]

The "Pentagon Papers" are a classic example. Leaked to the New York Times, these classified federal government reports disclosed many shocking truths about the Vietnam War. The Times published a series of articles based on the reports that prompted congressional hearings and

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16 *See, e.g., Here's How to Share Sensitive Leaks With the Press,* FOPF, Oct. 16, 2019, https://tinyurl.com/yh98rdxu.

17 *See, e.g.,* Ken Klippenstein & Lee Fang, *Truth Cops: Leaked Documents Outline DHS's Plans to Police Disinformation,* THE INTERCEPT, Oct. 31, 2022, https://tinyurl.com/ycywts5j.

18 *See generally* CONG. RESEARCH SERV., R41404, CRIMINAL PROHIBITIONS ON LEAKS & OTHER DISCLOSURES OF CLASSIFIED DEFENSE INFORMATION (updated May 11, 2023), https://tinyurl.com/42yntvmm.

widespread public concern regarding the War.[19] In the national security arena, such leaks are an indispensable 'coin of the realm' for coverage of government conduct that might otherwise never be disclosed.[20]

The status of certain government documents as legally protected often comes with criminal penalties for any government employee or contractor who discloses such documents without proper authorization. For instance, persons who disclose government documents that federal law deems 'classified' face a host of civil and criminal penalties. Because leakers risk such personal consequences, a heightened level of concern for protecting the anonymity of inside sources accompanies leaks.

In recent years—and across several presidential administrations—the federal government has stepped-up its prosecution of leakers.[21] At the same time, the government has become increasingly focused on charging

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19 Publication of the Pentagon Papers incident to a landmark U.S. Supreme Court opinion on "prior restraint," with the Court holding that the government had failed to justify imposition of a prior restraint. *See. New York Times Co. v. United States*, 403 U.S. 713, 714 (1971). A district court judge reaching the same conclusion wrote that: "'[a] cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority to preserve the even greater values of freedom of expression and the right of the people to know." *United States v. New York Times, Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971) (Gurfein, D.J.).

20 *See* Aff. of Max Frankel ¶5 (Wash. Bureau Chief, N.Y. TIMES), *United States v. New York Times Co.*, No. 71 Civ. 2662 (S.D.N.Y. June 17, 1971), *available online* https://tinyurl.com/2tnksnd4 ("[P]ractically everything that our Government does … in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same Government, by the Congress and by the press in one continuing round of professional and social contracts and …. exchanges of information.").

21 *See* Cleve R. Wootson, Jr., *Trump Rages About Leakers*, WASH. POST, June 8, 2017, https://tinyurl.com/mrt3y8ew.

journalists who either receive or published leaked information. In 2013, the Obama administration named Fox News journalist James Rosen a "criminal co-conspirator" in a search-warrant affidavit targeting leaker Stephen Jin-Woo Kim.[22] And in 2019, the Trump administration charged Wikileaks founder Julian Assange with violations of the Espionage Act for Assange's publication of classified defense information.[23]

This prosecutorial trend is not limited to the federal government or to the rarified world of national security.[24] The Minnesota Government Data Practices Act (MGDPA) contains a criminal-penalty provision under Minn. Stat. §13.09(a). This provision generally establishes a misdemeanor penalty for willful MGDPA violations. In 2014, the Legislature amended the MGDPA to include a new provision addressing data breaches.[25] Since then, at least one government entity has interpreted this new language as extending §13.09's criminal penalty to recipients of leaked material. This

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22 Tom McCarthy, *Fox News Reporter Targeted as 'Co-Conspirator' in Spying Case*, GUARDIAN, May 21, 2013, https://tinyurl.com/2e9uefdh.

23 Rachel Weiner, et al., *After Years of Debate, Trump Administration Chose to Pursue Criminal Case Against Assange*, WASH. POST, Apr. 11, 2019, https://tinyurl.com/3f34mjka (charges dating back to 2010 leak).

24 Minnesota is no stranger to leaks of protected government data, including active criminal investigative data. For example, state police official Paul Gerber permitted WCCO-TV reporter Don Shelby to review active investigative material in advance of police execution of a search warrant. In the criminal case that followed, counsel for the defendant attempted to question Shelby about this activity, but Shelby "claimed the newsman's privilege under the Minnesota Free Flow of Information Act." *State v. Astleford*, 323 N.W.2d 733, 734 (Minn. 1982). The Court determined that "defense counsel did not make a sufficient showing of relevance and materiality to justify the proposed questioning." *Id.* at 735.

25 *See* Act of May 21, 2014, ch. 284, 2014 Minn. Laws 1-3 (codified across various MGDPA provisions, including Minn. Stat. §13.055).

government entity notified a KSTP reporter of this significant position before KSTP's publication of a story based on leaked data.[26]

In the event that Minnesota government entities continue down this road and start criminally charging journalists who receive or publish protected government information, the MFFIA will assume center stage. Any criminal charge under §13.09 would be for a misdemeanor. Today, the MFFIA protects the identity of all sources (including leakers) from disclosure in the context of misdemeanors. *See* Minn. Stat. §595.024, subd. 2(1)(ii). This protection evaporates upon reading a general exception into the MFFIA for unlawful/tortious conduct, as a misdemeanor is unlawful conduct. Journalism will then suffer, as reporters will no longer be able to meet situations like the KSTP case with a firm invocation of the MFFIA—a law whose entire purpose is "to insure … the confidential relationship between the news media and its sources." *Id.* §595.022.

Conclusion

The Minnesota Legislature, considering the many different ways that the public benefits when the law protects journalists against compelled disclosure, crafted the MFFIA. This statute has since worked for over five decades, carefully balancing the interests of journalists of all stripes, law enforcement, and other parties (like defamation claimants). The Court should thus uphold the MFFIA as written by the Legislature—and not as reconceived by Energy Transfer's narrow, private interests.

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26 *See* Jay Kolls, *Minneapolis City Attorney Launches Probe Into Source of KSTP Story*, KSTP, Aug. 28, 2023, https://tinyurl.com/2s47p5m6.

Respectfully submitted,

Dated: October 28, 2024

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Certification of Brief Length

The undersigned counsel certifies that this amicus brief satisfies MRCAP 132.01. This brief: (1) is printed using 13–point, proportionally-spaced fonts; and (2) complies with the relevant word-limit, containing 5,721 words (including headings, footnotes, and quotations) according to the Word Count feature of the word-processing software that counsel used to prepare this brief (Microsoft Word 2010).

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